IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-3

JAMES J. CERVANTES,

Plaintiff-Appellant,

LARRY JONES,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 97 CV 1520—**George M. Marovich** *Judge.*

ARGUED March 31, 1999—DECIDED August 13, 1999

Before POSNER, Chief Judge, and FLAUM and MANION, Circuit Judges.

MANION, Circuit Judge. Officer Larry Jones testified before an Illinois grand jury about evidence linking James Cervantes to the brutal murder of Cervantes' sometimes girlfriend, Sally Lavergne. After hearing the prosecutor's evidence, including Jones' testimony, the grand jury indicted Cervantes for first degree murder. Pending trial, Cervantes remained incarcerated for almost three years. A jury later acquitted him of the murder. Subsequently, Cervantes sued Jones under 42 U.S.C. §1983 and Illinois law, alleging that Jones violated Cervantes' rights under the Fourth Amendment and Illinois law by testifying falsely before the grand jury. The district court granted summary judgment for Jones, from which Cervantes appeals. We affirm.

-I-

On July 20, 1992, a neighbor discovered the dead body of Sally Lavergne in Lavergne's apartment in South Elgin,

Illinois. Lavergne's death resulted from multiple stab wounds from a butcher's knife in her chest and abdomen, although she also suffered severe skull fractures from a beating with a glass ashtray. There were no signs of forced entry, and the assailant fled without leaving any fingerprints. Cervantes became a suspect early in the investigation, as he was one of Lavergne's few friends. Elgin Deputy Chief of Police Larry Jones first interviewed Cervantes on July 20, and again with another officer present on July 25.

Late at night on December 8, 1992, after discussing the murder with Cervantes at his apartment, Jones and two other officers took Cervantes to the police station for a polygraph examination. The examination indicated that Cervantes was untruthful when he denied killing Lavergne.

At approximately 5:00 a.m. on December 9, after the police finished questioning Cervantes, Jones drove him home. During the ride, Cervantes and Jones carried on a conversation in which Jones mentioned to Cervantes that it seemed he wanted to come clean. Cervantes' response to this statement is disputed, so we accept his version in the posture of this case. According to Cervantes, he responded: "If I confess to a crime that I did not commit, what would my defense be? I've got too much to lose." Jones tells a slightly different story, but the differences are important. Jones testified to the grand jury that Cervantes' response was: "Yes I would like to do that [confess to the crime]. But I've got too much to lose. If I admit I killed Sally, what would my defense be?" Cervantes contends that Jones also lied to the grand jury by telling it that Cervantes admitted to lying about whether he was at his mother's house on the day of the murder,[1] that he

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1. Both we and the parties are being imprecise in referring to the "day of the murder," or the "night of the murder." The police estimate that the murder occurred sometime between 9:45 p.m. on July 19, and 6:30 a.m. on July 20, 1992.

has difficulty controlling his temper when he drinks, and that he had been drinking and smoking marijuana on the night of the murder.

After hearing the prosecutor's evidence, including Jones' version of events, the grand jury indicted Cervantes for Lavergne's murder. He was arrested and held in custody for almost three years while awaiting his trial for capital murder. On March 7, 1996, he was released from custody when a jury acquitted him. Cervantes sued under Illinois law and 42 U.S.C. §1983, alleging that Jones violated his Fourth Amendment and Illinois common law rights by maliciously prosecuting him. Jones moved for summary judgment, arguing, among other things, that probable cause existed for the prosecution and that he enjoyed absolute immunity. The district court granted summary judgment for Jones, holding that Jones did not initiate or continue the prosecution of Cervantes, and that Jones was therefore entitled to absolute immunity. *Cervantes v. Jones,* 23 F.Supp.2d 885, 890, 892 (N.D.Ill. 1998). Cervantes appeals, and we review the grant of summary judgment de novo. *DiGiore v. Ryan,* 172 F.3d 454, 459 (7th Cir. 1999).

-II-

Section 1983 establishes a cause of action for persons deprived of constitutional rights by government officials acting under color of state law. 42 U.S.C. §1983. Where a criminal defendant is prosecuted without reasonable grounds and was unlawfully incarcerated before his trial, he may bring an action for malicious prosecution under §1983, ostensibly for a violation of his Fourth Amendment rights.[2] As

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2. In *Albright v. Oliver,* the Supreme Court held that an action for malicious prosecution cannot be based on substantive due process, but declined to decide whether the Fourth Amendment could serve as the basis for such suits. 510 U.S. 266, 275, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994).

some judges have recognized, "the tort of malicious prosecution fits uneasily within the Fourth Amendment. That amendment proscribes unreasonable searches and seizures and has been held to prohibit arbitrary law-enforcement actions up until the time of arraignment. To justify a Fourth Amendment malicious prosecution claim, then, one has to extend the period of 'seizure' past arraignment." *Kerr v. Lyford,* 171 F.3d 330, 343 (5th Cir. 1999) (Jones, J., concurring); see *Wilkins v. May,* 872 F.2d 190, 194 (7th Cir. 1989) (rejecting the concept of a continuing seizure). For present purposes, however, we assume that Cervantes had a right under the Fourth Amendment to be free from malicious prosecution. To withstand summary judgment, a plaintiff alleging malicious prosecution under §1983 must create a genuine issue of material fact as to each element of this constitutional tort. That is, he must provide some evidence that: (1) he has satisfied the requirements of a state law cause of action for malicious prosecution; (2) a state actor committed the malicious prosecution; and (3) he was deprived of liberty. *Sneed v. Rybicki,* 146 F.3d 478, 480 (7th Cir. 1998); *Reed v. City of Chicago,* 77 F.3d 1049, 1051 (7th Cir. 1996). Under Illinois law, the tort of malicious prosecution requires a showing that: (1) the plaintiff was subject to judicial proceedings; (2) for which there was no probable cause; (3) the defendant instituted or continued the proceedings maliciously; (4) the proceedings were terminated in the plaintiff's favor; and (5) there was an injury. *Rybicki,* 146 F.3d at 480-81; *Reed,* 77 F.3d at 1051.

The district court granted summary judgment based on the "instituted or continued the proceedings maliciously"

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2. *Smart v. Board of Trustees of the Univ. of Ill.,* 34 F.3d 432, 434 (7th Cir. 1994).

element and absolute immunity, which as we shall see, involve essentially the same question. Although the text of §1983 does not admit of any immunities to suits brought under this section, the Supreme Court has held that these suits are subject to the immunities available at common law, so long as they are not in conflict with the purposes of §1983. *Burns v. Reed,* 500 U.S. 478, 484, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991); *Malley v. Briggs,* 475 U.S. 335, 339-40, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). Accordingly, in order to protect prosecutors from vindictive lawsuits which might directly or indirectly impede their roles as public servants, prosecutors enjoy absolute immunity for activities which are "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman,* 424 U.S. 409, 430, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). Similarly, to prevent the harassment of witnesses and to promote unrestrained testimony in criminal cases, the Supreme Court held that witnesses at trials are absolutely immune from suits under §1983 for providing false testimony at trials. *Briscoe v. LaHue,* 460 U.S. 325, 334, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983); see *Jurgensen v. Haslinger,* 295 Ill.App.3d 139, 229 Ill.Dec. 574, 692 N.E.2d 347, 349 (1998) (Illinois law). For the same reasons, this immunity extends to witnesses who commit perjury in pretrial proceedings. *Curtis v. Bembenek,* 48 F.3d 281, 285 (7th Cir. 1995) (police officer entitled to immunity for providing perjurious testimony in probable cause and suppression hearings).[3] Thus, a witness is

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3. Again, immunity is extended to these witnesses because "a witness who knows he may be subjected to costly and time-consuming civil litigation for offering testimony that he is unable to substantiate may consciously or otherwise shade his testimony in such a way as to limit potential liability." Curtis, 48 F.3d at 285 (citation and internal quotations omitted).

absolutely immune from suits based on testimony given before a grand jury. *Jones v. Cannon,* 174 F.3d 1271, 1286 (11th Cir. 1999); *Kincaid v. Eberle,* 712 F.2d 1023, 1024 (7th Cir. 1983) (per curiam).

An exception to this wall of immunity for trial and pre-trial testimony exists for a "complaining witness." Complaining witnesses were not absolutely immune from malicious prosecution suits at common law.[4] *Malley,* 475 U.S. at 340, 106 S.Ct. 1092; *Harris v. Roderick,* 126 F.3d 1189, 1199 (9th Cir. 1997). "The common law made a subtle but crucial distinction between two categories of witnesses with respect to their immunity for false testimony. Those whose role was limited to providing testimony enjoyed immunity; those who played a role in initiating a prosecution— complaining witnesses—did not enjoy immunity." *White v. Frank,* 855 F.2d 956, 958-59 (2d Cir. 1988). To qualify as a complaining witness (and thereby be disqualified from absolute immunity), a witness must play a sufficient role in initiating the prosecution.[5] Id. at 962. Of course, merely

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4. The common law distinguished defamation actions from suits for malicious prosecution. All witnesses had immunity from defamation actions for testimony given in court, but complaining witnesses were still subject to lawsuits for malicious prosecution. *Enlow v. Tishomingo County, Miss.,* 962 F.2d 501, 511 (5th Cir. 1992); *see Burns,* 500 U.S. at 501, 111 S.Ct. 1934 (Scalia, J., concurring and dissenting). In a defamation action, the plaintiff seeks to hold the perjurious witness liable for the defamatory effects of his testimony; in a malicious prosecution claim, the plaintiff's complaint centers on the witness' role in initiating a meritless prosecution. *Enlow,* 962 F.2d at 511 n. 29.

5. A witness' status as a complaining witness is a question of fact. *Anthony v. Baker,* 955 F.2d 1395, 1399 (10th Cir. 1992).

providing false testimony to a grand jury is not enough. Id. at 961. Rather, as we stated in *Curtis*, a complaining witness is one " 'who actively instigated or encouraged the prosecution of the plaintiff.' " 48 F.3d at 286 (quoting *Anthony*, 955 F.2d at 1399 n. 2); see *Ireland v. Tunis*, 113 F.3d 1435, 1447 (6th Cir. 1997) (no immunity for a "complaining witness who set the wheels of government in motion by instigating a legal action"); *Enlow*, 962 F.2d at 511 (a complaining witness is one who actively instigated, encouraged, or perpetrated the prosecution). Thus, the term "complaining witness" is something of a misnomer, as the complainant need not testify as a witness so long as he played a significant role in initiating or procuring the prosecution. *Kalina v. Fletcher*, 522 U.S. 118, 118 S.Ct. 502, 512, 139 L.Ed.2d 471 (1997) (Scalia, J., concurring).

As we mentioned above, the district court found that Jones was not an initiator of the prosecution, and thus Cervantes failed to establish an essential element of his Illinois and federal claim and Jones was entitled to absolute immunity. 23 F.Supp.2d at 890. Indeed, the record showed that while Jones was the one who suggested that the Kane County State's Attorney's Office obtain blood and hair samples from Cervantes, he never exhorted prosecutors to seek an indictment of Cervantes—at least not in so many words. According to the affidavit of the State's Attorney, John Barsanti, he (Barsanti) made the decision to prosecute Cervantes. But we note that Jones was the only witness to testify before the grand jury, and during that testimony he made allegedly false statements indicating that Cervantes essentially confessed to the murder. Jones also appeared to be the lead investigator and the police official who kept the investigation going. *See White*, 855 F.2d at 957, 962 (police officers may be complaining witnesses due to their testimony before a grand jury despite the fact that the prosecutor also played a significant role in advancing the prosecution); *Jones v. City of Chicago*, 856 F.2d 985, 993 (7th Cir. 1988) ("the jury could find that

the defendants systematically concealed from the prosecutors, and misrepresented to them, facts highly material to—that is, facts likely to influence—the decision to prosecute''). After considering these and other facts (which we construe in the light most favorable to Cervantes), we think that Jones' role as the instigator of Cervantes' prosecution is a closer question than the district court suggested. As we said in Jones, ''[i]f police officers have been instrumental in the plaintiff's continued confinement or prosecution, they cannot escape liability by pointing to the decisions of prosecutors or grand jurors or magistrates to confine or prosecute him.'' 856 F.2d at 994. Thus, because we may affirm a summary judgment on any ground for which there is adequate support in the record, we turn instead to the easier question of whether probable cause existed. *See EEOC v. North Knox Sch. Corp.*, 154 F.3d 744, 746 (7th Cir. 1998).

The existence of probable cause for the prosecution is a complete defense to an action for malicious prosecution under both Illinois and federal law.[6] *Schertz v. Waupaca County*, 875 F.2d 578, 582 (7th Cir. 1989); *Burghardt v. Remivac*, 207 Ill.App.3d 402, 152 Ill.Dec. 367, 565 N.E.2d 1049, 1052 (1991). The determination of probable cause is a mixed question of law and fact.[7] *Ornelas v. United States*,

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6. The district court did not reach the issue of whether probable cause existed, but relied instead on the grounds mentioned above.

7. A grand jury indictment is usually prima facie evidence of probable cause. *Bontkowski v. United States*, 28 F.3d 36, 37 (7th Cir. 1994). But in construing the facts in the light most favorable to Cervantes, his allegation that the indictment was the product of Jones' perjury precludes us from considering the indictment in our probable cause analysis. A contrary rule could allow an indictment procured by lies to protect a witness from liability for his perjury. *See Harris v. Roderick*, 126 F.3d 1189, 1198 (9th Cir. 1997).

517 U.S. 690, 696, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); *Humphrey v. Staszak*, 148 F.3d 719, 725 (7th Cir. 1998). But when facts sufficient to create probable cause are undisputed, probable cause is a question of law. *Potts v. City of Lafayette, Ind.*, 121 F.3d 1106, 1112 (7th Cir. 1997); *People v. Cooke*, 299 Ill.App.3d 273, 233 Ill.Dec. 676, 701 N.E.2d 526, 529 (1998). Of course, a dispute concerning some facts relevant to the probable cause analysis does not preclude a finding of probable cause so long as the finding survives after adopting the plaintiff's version of the disputed facts for which there is some support in the record. *Kerr*, 171 F.3d at 340 n. 13; *Wolter v. Safeway Stores*, 153 F.2d 641, 642 (D.C.Cir. 1946). Probable cause means "the existence of such facts and circumstances as would excite the belief, in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted." *Kerr*, 171 F.3d at 340 (footnote and internal quotations omitted); *see Frye v. O'Neill*, 166 Ill.App.3d 963, 117 Ill.Dec. 882, 520 N.E.2d 1233,1241 (1988); *Kincaid v. Ames Dep't Stores, Inc.*, 283 Ill.App.3d 555, 219 Ill.Dec. 215, 670 N.E.2d 1103, 1109 (1996). This analysis is based on "'factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' " *Humphrey*, 148 F.3d at 726 (quoting *Brinegar v. United States*, 338 U.S. 160, 175, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949)). Importantly, the official's subjective belief as to the legal basis of the prosecution is irrelevant; the test for probable cause is an objective one. *Graham v. Connor*, 490 U.S. 386, 398, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) ("The Fourth Amendment inquiry is one of 'objective reasonableness' under the circumstances...."); *Potts*, 121 F.3d at 1113; *Sheik-Abdi v. McClellan*, 37 F.3d 1240, 1247 (7th Cir. 1994).

In February 1993, the FBI's National Center for the Analysis of Violent Crime prepared a profile of Lavergne's killer based on the evidence gathered from the murder scene,

the assailant's modus operandi, and common sense. While this isn't summary judgement evidence itself, it shows how a reasonable person might interpret the facts which were available to Jones. Using their experience with prior violent crimes, the FBI depicted the probable assailant in terms that are strikingly descriptive of Cervantes. The report described the probable assailant as having low socio-economic status, being at least thirty years of age, an alcohol or drug abuser, and someone who has a history of abusing those weaker than he, such as women or children. The FBI report also concluded (as a reasonable person could) that:

- The nature of the wounds, use of multiple weapons, and the knife being left in the victim, suggest personalized anger and is normally generated from someone who has an anger towards the victim for a longer period of time than the day of this murder. The offender came to the victim's apartment angry; however, because he used weapons of opportunity he may not have planned to go there to kill her. However, once at the victim's apartment, interaction between the victim and the offender escalated to murder.

- Because the offender took time to conduct some cleanup after the murder, it is likely he was familiar with the apartment, and had a higher degree of comfort in the apartment than might be expected from a stranger. [FBI Rept. pp 2-3]

Cervantes' correlation with the profile started with his age, as Cervantes was in his early thirties. With respect to his socio-economic status, Cervantes was not affluent, as he was earning $9 per hour at the time he was arrested. There was no sign of a forced entry, which was consistent with the theory that the assailant was (like Cervantes) known to Lavergne or (again like Cervantes) had keys to Lavergne's apartment. Moreover, Cervantes' relationship with the victim was not a fleeting one, as they occasionally had sexual relations— despite the fact that Cervantes was married to

another woman, Theresa Cervantes. Police interviews with Lavergne's co-workers, family, and friends revealed that the victim was often seen with a man who appeared to be Hispanic, and that Lavergne would let this man use her apartment, would give him rides to work, and may have loaned him money. Lavergne's neighbor—Lillian Peyton--told police that the Hispanic man's name was "James," and confirmed that James had a key to Lavergne's apartment.

With respect to the FBI's reasoning that the assailant was known to be violent and had festering anger towards the victim, a friend who lived with Lavergne during the summer of 1991—Arlene Miller—informed Jones that Lavergne had complained that Cervantes had beaten her, and showed bruises from the beatings on her head, face, and arms. These beatings were also in accordance with the FBI's inference that the assailant had a history of abuse toward weaker people. Cervantes' violent nature was further confirmed by Sandra Skoty— Cervantes' former housemate and mother of his child—who told the police that Cervantes had difficulty controlling his temper when he drank alcohol, and that on one occasion when she was pregnant, Cervantes struck her. Theresa Cervantes and Penny Newman (Cervantes' girlfriend and housemate at the time of the murder) also told the police that Cervantes had struck them when he had been drinking, and Theresa Cervantes has a scar on her lip to prove it.

Cervantes was also a known alcoholic, consistent with the FBI's projection that the killer was an alcohol or drug abuser. Furthermore, Newman confirmed what the other women in Cervantes' life said: he was especially violent after drinking alcohol. Beyond Cervantes' correlation with the FBI's profile, numerous other facts cast suspicion on Cervantes./ Marilene Gable—a friend of Penny Newman—told police that Newman told her on the night of Lavergne's murder that Newman and Cervantes were going over to James's friend Sally's house that evening. After the murder occurred, Newman told Gable that Lavergne was indeed the

woman she and James had intended to visit that night, but that they never made the trip to Lavergne's apartment. Newman gave no reason for the sudden change of plans, other than that Cervantes was tired. As to particularized anger towards Lavergne, the owner of a restaurant that Lavergne frequented—Marguerite Lombardo--told police that Lavergne and an Hispanic man had been at the restaurant a few days prior to the murder, and after the Hispanic man left Lavergne confided to her that the man was "mad" at her because she told him that he could no longer use her apartment. Furthermore, Cervantes admits that he met Lavergne at the restaurant around that time in order to invite her to dinner while his girlfriend was away. Additionally, Cervantes had an opportunity to commit the crime. Newman told police that she was not sure what time she went to bed the night of the murder and acknowledged that Cervantes might have left the house after she went to sleep, thus negating Cervantes' alibi. Also, a polygraph examination indicated that Cervantes was not being truthful when he denied killing Lavergne.[8]

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8. After a suppression hearing (not at issue here) before Kane County Circuit Court Judge James Doyle, Judge Doyle determined that the FBI agent who conducted Cervantes' polygraph examination committed perjury. Specifically, Agent Michael Hanna lied under oath at the suppression hearing when he told Judge Doyle that he was admitted to the Iowa bar. This fact was relevant to the suppression hearing because around the time of the polygraph examination, Cervantes suggested to Hanna that he might like to speak to a lawyer. In an effort to discourage this, Hanna told Cervantes that anything Cervantes wanted to discuss with a lawyer he could address to Hanna, as he was a lawyer. Of course, we find it disheartening, to say the least, that a federal agent would use lies in an attempt to convict a defendant in a capital murder case. But although Cervantes contends that Hanna's penchant for dishonesty tainted the polygraph results, our first analysis of probable cause is based on the information available at the time the prosecution was instituted. At that time, nobody had any reason to suspect that

Similarly, Newman's polygraph results suggested that she was untruthful when she denied involvement in the murder or knowledge of who was involved.[9] Finally, another part of Cervantes' alibi—that he was at his mother's house sometime during the day of the murder—could not be corroborated. Furthermore, it might seem strange to a reasonable person that Cervantes picked that day to visit his mother, as his mother told police that she hadn't seen him in some time and didn't even know where he lived.[10] probable cause existed); *Herb Hallman Chevrolet v. Nash-Holmes,* 169 F.3d 636, 643

Hanna was dishonest. Regardless, probable cause to prosecute Cervantes existed even without the polygraph evidence.

9. Cervantes argues that polygraph evidence cannot be considered in determining whether probable cause existed for prosecuting him. It is true that due to the suspected unreliability of polygraphs, Illinois courts have created a rule that the police, grand juries, and courts may not rely on polygraph evidence in determining whether probable cause exists. *People v. Allen,* 249 Ill.App.3d 1001, 189 Ill.Dec. 788, 620 N.E.2d 1105, 1114 (1993); *People v. McClellan,* 232 Ill.App.3d 990, 175 Ill.Dec. 476, 600 N.E.2d 407, 416 (1992). But as a matter of federal law, polygraph results are one of many factors which may be used in determining whether, from an objective viewpoint, probable cause for an arrest existed under the Fourth Amendment. *Booker v. Ward,* 94 F.3d 1052, 1058 (7th Cir. 1996) (relying on polygraph results as one factor in finding that Illinois police officers had probable cause for an arrest as a matter of law); *see Kerr,* 171 F.3d at 341 (relying on polygraph evidence in determining that

10. Cervantes argues that his mother certainly knew where he lived. But her actual knowledge is irrelevant; the question is what did she tell the police, and Cervantes offers no evidence that his mother did not make this statement to the police.

(9th Cir. 1999) (same); *Craig v. Singletary*, 127 F.3d 1030, 1046 (11th Cir. 1997) (indications of deceptiveness from polygraph may be one factor considered in probable cause analysis); *Johnson v. Schneiderheinz*, 102 F.3d 340, 342 (8th Cir. 1996) ("the negative polygraph exam results were not the only undisputed facts upon which probable cause could rest"); *Marx v. Gumbinner*, 905 F.2d 1503, 1506, 1507 (11th Cir. 1990); *Bennett v. City of Grand Prairie, Tex.*, 883 F.2d 400, 405-06 (5th Cir. 1989) (polygraph results, in conjunction with other evidence, may be used in determining whether probable cause exists to issue warrant). Therefore, this argument is without merit. Furthermore, as we mentioned above, the polygraph evidence was not essential to establishing probable cause.

Because probable cause is based on the totality of the circumstances, exculpatory evidence is also relevant. Although Lavergne's blood was found throughout the apartment, no analyzable fingerprints were found. But this by no means eliminates probable cause for suspecting Cervantes. Rather, using the rationale employed by the FBI report, the wiping away of fingerprints enhances the suspicion that the assailant was someone like Cervantes, who was familiar with the apartment, knew that nobody was likely to disturb him, and thus was comfortable taking his time to erase any traces of his presence.

More favorable to Cervantes was Lavergne's previous promiscuity and the fact that she once allowed another man to stay overnight in her apartment, thus raising the possibility that someone else committed the crime. Cervantes suggests that this possibility gets some support from the DNA which was extracted from blood found on a towel in Lavergne's bathroom, as it belonged to neither the victim nor Cervantes. Also in Cervantes' favor, there were no eyewitnesses or physical evidence linking Cervantes to the crime. At the same time, there were no eyewitnesses linking anyone else to the crime. Finally, there were Cervantes' own self-serving

denials—the value of which was diminished by the polygraph results—and his uncorroborated alibi that he was at home the night of the murder. Perhaps some or all of these tidbits ultimately caused the jury not to find guilt beyond a reasonable doubt. But preliminarily, at least, most of the evidence pointed to Cervantes. He, after all, was the only man known to have had keys to Lavergne's apartment, and he still had one key after the murder. Also, he was the only man Lavergne ever mentioned to her sister Diane. In short, the totality of the facts in the record and the inferences derived from them would lead a reasonable person to the strong suspicion that Cervantes murdered Lavergne. Therefore, even without Jones' disputed testimony, probable cause existed to prosecute Cervantes for this crime. *Cf. Meehan v. Town of Plymouth*, 167 F.3d 85, 91 (1st Cir. 1999) (describing the circumstantial evidence that led to a finding of probable cause). Because the prosecution was supported by probable cause as a matter of law, Jones has a complete defense to the malicious prosecution suit, and Cervantes is unable to establish an essential element of his Illinois law claim and his §1983 claim based on the Fourth Amendment.[11] Therefore, the

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11. Cervantes also complains that he was not given time to depose Jones and the prosecuting attorney, John Barsanti. In responding to Jones' motion for summary judgment, Cervantes argued to the district court that Barsanti's affidavit was irrelevant, but argued in the alternative that if it were relevant, ruling on the motion should be continued pursuant to Fed.R.Civ.P. 56(f), so that Cervantes could depose Jones and Barsanti. The district court did not abuse its discretion in addressing the summary judgment motion without granting Cervantes additional time for depositions. First, a request for additional time which is conditioned on whether the district court thinks a deposition would be fruitful is not a proper request for a continuance, as it requires the district judge to act as the plaintiff's agent and to advise him on what discovery he should pursue. Also, Cervantes' excuse for failing to depose Barsanti before the

district court correctly granted summary judgment.[12]

AFFIRMED.

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motion for summary judgment—that he refrained from taking depositions in order to foster an atmosphere conducive to settlement—is insufficient and borders on the foolish. *See Farmer v. Brennan*, 81 F.3d 1444, 1449 (7th Cir. 1996) (to obtain a continuance under Fed.R.Civ.P. 56(f) a party must (1) request a continuance, and (2) provide a sufficient reason for requesting the continuance).

12. Because we affirm the summary judgment, Jones' motion to strike Cervantes' reply brief is moot.

IN THE
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FOR THE SEVENTH CIRCUIT

No. 98-3

JAMES J. CERVANTES,

Plaintiff-Appellant,

LARRY JONES,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 97 CV 1520—**George M. Marovich** *Judge.*

[August 13, 1999]

JUDGMENT — WITH ORAL ARGUMENT

Honorable Richard A. Posner, Chief Judge
Honorable Joel M. Flaum, Circuit Judge
Honorable Daniel A. Manion, Circuit Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JAMES J. CERVANTES,

Plaintiff,

No. 97 CV 1520 *v.*

LARRY JONES,

Defendant.

MEMORANDUM OPINION AND ORDER

Plaintiff James J. Cervantes ("Cervantes") filed this action against Defendant South Elgin Deputy Chief of Police Larry Jones ("Jones") pursuant to 42 U.S.C. §1983 (" s 1983") and Illinois law alleging claims of malicious prosecution. Cervantes alleges that Jones fabricated evidence that made it falsely appear that Cervantes had committed murder. Cervantes further alleges that Jones falsely testified before a grand jury to the truthfulness of the fabricated evidence and that, as a result, Cervantes was indicted for murder. Now before the Court is Jones' motion for summary judgment. For the reasons set forth below, this Court grants Jones' motion.

BACKGROUND[1]

At approximately 6:30 a.m. on July 20, 1992, a neighbor of Sally Lavergne ("Lavergne") notified the police after hearing Lavergne's alarm clock ringing and finding Lavergne's door open. The police subsequently found Lavergne dead in her home in South Elgin, Illinois. A post-mortem evaluation of Lavergne suggested, among other

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1. Unless otherwise indicated, the following facts are not disputed.

things, that Lavergne died of multiple stab wounds to her chest and abdomen.

Upon finding Lavergne, the police immediately began an investigation by, among other things, interviewing Lavergne's co-workers, family and friends. The investigation regarding Lavergne's murder took place over several months and included various officers and agents from the South Elgin Police Department, Illinois State Police Department, St. Charles Police Department, West Dundee Police Department and the FBI. One of the police officers investigating Lavergne's murder was Jones.

After receiving information suggesting that Cervantes had been intimately involved with Lavergne prior to her death, Jones interviewed Cervantes on July 20, 1992 and again, with another detective, on July 25, 1992. On December 8, 1992, Jones and two other detectives again interviewed Cervantes at Cervantes' apartment. Later that night, Cervantes went to the police station around midnight and took a polygraph examination.

At about 5:00 a.m. the next morning, December 9, 1992, Jones gave Cervantes a ride home from the police station. During the ride home, Jones stated to Cervantes that it seemed like Cervantes wanted to admit what he had done and "come clean." (Def. 12(m), Ex. 1(b) at 21; Ex. 4 at 74.) The parties dispute Cervantes' response to this statement. According to Jones' grand jury testimony given March 16, 1993, Cervantes stated: "Yes, I would like to do that. But I've got too much too [sic] lose. If I admit I killed Sally, what would my defense be?" (Id. at 21-22.) According to Cervantes' testimony at a hearing held January 24, 1994 regarding a motion to suppress, Cervantes responded to Jones by stating: "[I]f I confess to a crime that I did not commit, what would my defense be? I got too much to lose." (Def. 12(m), Ex. 4 at 75.)

In February of 1993, Jones went to John A. Barsanti ("Barsanti"), Chief of the Criminal Division of the Kane County State's Attorney's Office, regarding the possibility of seeking a warrant for hair and blood samples from Cervantes in connection with the Lavergne murder investigation. Upon his independent review of the investigative reports, Barsanti concluded that there were sufficient grounds to take the matter before the grand jury and to seek an indictment of Cervantes for Lavergne's murder. (Def. 12(m) p 40; Pl. 12(n) p 40.) Jones testified before the grand jury after being subpoenaed by Barsanti, and Cervantes was subsequently indicted. Following the grand jury indictment, Cervantes was arrested and remained in custody from March 17, 1993 until March 7, 1996, when he was found not guilty and released.

On March 6, 1997, Cervantes filed this action alleging that Jones engaged in malicious prosecution in violation of the Fourth Amendment and Illinois law. Cervantes contends that as a result of Jones' actions, Cervantes lost wages, suffered severe emotional distress and, while incarcerated, was seriously injured by other inmates. Cervantes seeks compensatory and punitive damages. On July 29, 1997, this Court denied Jones' motion to dismiss in which Jones argued that: (1) Cervantes had failed to state a claim for malicious prosecution; and (2) he enjoyed absolute immunity for any false testimony given to the grand jury. See *Cervantes v. Jones*, 1997 WL 433685 (N.D.Ill. July 29, 1997). Jones now moves for summary judgment.

SUMMARY JUDGMENT STANDARD OF REVIEW

Summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). When making such a determination, the court must construe the evidence and make all reasonable inferences in favor of the non-moving party. *See Anderson*

v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Summary judgment is appropriate, however, when the non- moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). *See also Courtney v. Biosound*, 42 F.3d 414, 418 (7th Cir. 1994).

DISCUSSION

To state a claim for malicious prosecution under s 1983, a plaintiff must demonstrate that: (1) he has satisfied the requirements of a state law cause of action for malicious prosecution; (2) the malicious prosecution was committed by state actors; and (3) he was deprived of liberty. *See Washington v. Summerville*, 127 F.3d 552, 558 (7th Cir. 1997); *Reed v. City of Chicago*, 77 F.3d 1049, 1051 (7th Cir. 1996). To state a claim for malicious prosecution under Illinois law, a plaintiff must allege that: (1) he was subjected to judicial proceedings; (2) for which there was no probable cause; (3) the defendant instituted or continued the proceedings maliciously; (4) the proceedings terminated in plaintiff's favor; and (5) there was an injury. *See Sneed v. Rybicki*, 146 F.3d 478, 481 (7th Cir. 1998).

In his motion for summary judgment, Jones argues that: (1) Cervantes cannot demonstrate all of the factors necessary to state a claim for malicious prosecution under Illinois law; and (2) Jones enjoys absolute immunity for presenting any false testimony to the grand jury. This Court will address these arguments in turn.[2]

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2. Jones additionally argued that Cervantes failed to timely file his s 1983 malicious prosecution claim. "For malicious prosecution ... the cause of action does not accrue until the criminal proceedings are over." *Sneed v. Rybicki*, 146 F.3d 478, 481 (7th Cir. 1998). Here, it is undisputed that the

I. Malicious Prosecution Claim

As stated, to prove a malicious prosecution claim, a plaintiff must satisfy the requirements of a state law cause of action for malicious prosecution. Jones asserts that Cervantes cannot do so here because, as a matter of law, (1) Jones did not institute or continue the proceedings maliciously and (2) there was probable cause for Cervantes to be subjected to judicial proceedings.

In order to be liable for malicious prosecution, "a defendant either must have initiated a criminal proceeding or his participation in it must have been of so active and positive a character as to amount to advice and cooperation." *Denton v. Allstate Ins. Co.*, 152 Ill.App.3d 578, 583, 105 Ill.Dec. 471, 504 N.E.2d 756, 760 (1st Dist. 1986). Put another way, "[l]iability for malicious prosecution ... extends to [police officers] who played a significant role in causing the prosecution of the plaintiff [.]" *Frye v. O'Neill*, 166 Ill.App.3d 963, 975, 117 Ill.Dec. 882, 520 N.E.2d 1233, 1240 (4th Dist. 1988). *See also Reed*, 77 F.3d at 1053 (plaintiff must show that the officer used improper influence on the prosecutor or made knowing misstatements to the prosecutor in order to secure prosecution); *Newsome v. James*, 968 F.Supp. 1318, 1323 (N.D.Ill. 1997) (stating the issue as whether the police officer "got the ball rolling in the unwarranted prosecution" of the plaintiff). Cervantes' action for malicious prosecution centers around the disputed

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criminal proceedings ended on March 7, 1996, that Cervantes filed his Complaint on March 6, 1998 and that the statute of limitations period for malicious prosecution claims under s 1983 is two years. Therefore, the Court rejects Jones' limitations argument.

conversation which occurred between Cervantes and Jones coming home from the police station on the morning of December 9, 1992, i.e., whether Cervantes stated that he would like to confess to the Lavergne murder.[3] (See Pl. Resp. at 2, 11.) Upon careful review of the record here, even assuming that Jones' grand jury statements were fabrications, the Court finds that a reasonable jury could not conclude that Jones "institute[d] or continue [d] the proceedings maliciously" as defined above.

Instead, the evidence indisputably reveals that Barsanti, not Jones, instituted Cervantes' criminal proceedings. Indeed, Cervantes admits that Barsanti independently reviewed the investigative reports into the Lavergne murder and concluded that there were sufficient grounds to take the matter before the grand jury. (See Def. 12(m), Ex. 1 p 3; Pl. 12(n) p 40.) Additionally, Barsanti states that "[a]t no

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3. Cervantes' affidavit alludes to certain other allegedly inaccurate statements made by Jones to the grand jury. (See; Pl. 12(n), Ex. 7 p 6.) Jones moves to strike this portion of Cervantes' affidavit, arguing that these contentions contradict Cervantes' prior answers to certain interrogatories. (See Def. Mot. to Strike at 2-4.) Although Cervantes alludes to these additional grand jury statements by Jones in his response brief (see Pl. Resp. at 6-7), Cervantes does not argue that these statements were fabrications which played a role in Cervantes' indictment. Instead, as stated by Cervantes, "[t]he primary disputed question is whether defendant Jones fabricated the story that plaintiff said he would 'like to confess' to Lavergne's murder" and whether that alleged fabrication caused Cervantes' injuries. (Id. at 11. See also Pl. 12(n) p. 56.) Because these additional statements do not form the basis for Cervantes' claim, this Court need not discuss them further, and Jones' motion to strike Cervantes' presentation of the statements is denied as moot.

time did ... Jones ever request that an indictment be sought of James Cervantes, that decision I reached on my own." (See Def. 12(m), Ex. 1 p 4.) And, once Barsanti initiated the prosecution, Cervantes admits that Barsanti alone made the decision to continue Cervantes' prosecution. (Def. 12(m) p 54; Pl. 12(n) p 54.)

The evidence also discloses that Jones' alleged false statements played no role in the initiation of proceedings against Cervantes. Barsanti states that although he reviewed reports containing the allegedly false statements by Jones, "those statements did not play a role in [Barsanti's] decision to seek an indictment of James Cervantes because in [his] view, those statements were equivocal in nature." (See Def. 12(m), Ex. 1 p p 8.) Barsanti states that he would have sought an indictment of Cervantes even without those statements. (Id.)

In his affidavit, Barsanti provides this Court with a considerable list of facts which he states led him to conclude that there was probable cause to prosecute Cervantes for Lavergne's murder. (See Def. 12(m), Ex. 1 pp 6(a)-(z)). Some of the evidence which led to Barsanti's decision, in brief, were the facts that:

- the crime scene indicated no sign of forced entry, suggesting that Lavergne knew her assailant (id. p 6(h));
- the similar nature of a knife used in the murder and the knives in the victim's kitchen suggested that the murder was not planned (id. p 6(e));
- interviews from family and friends suggested that Cervantes was often seen with Lavergne (id. p 6(i)-(m));
- according to interviews with police investigators, Cervantes admitted to occasionally residing with Lavergne when he was having marital problems and having had a key to Lavergne's apartment (id. p 6(o));

- police believed that Cervantes' initial alibi, that he was at his mother's on the day the murder occurred, was contradicted by further investigation (id. p 6(o));
- in another police interview, a waitress stated that, after serving Lavergne and a man who fit Cervantes' description, Lavergne told the witness that the man was mad because Lavergne had told him that he could no longer use her apartment (id. p 6(p));
- in another police interview, an acquaintance of Lavergne and Cervantes stated that, on at least one occasion, Cervantes beat Lavergne (id. p 6(q));
- in other police interviews, a woman who had once lived with Cervantes stated that he drank heavily and had difficulty controlling his temper when he was intoxicated, and Cervantes' estranged wife stated that, on one occasion, Cervantes struck her on her face after confronting him about his drinking (id. pp 6(r-s));
- in another police interview and subsequently in a polygraph examination, Cervantes' girlfriend, Penny Newman, stated that Cervantes was a violent person, especially after drinking, and had struck her at least three times during their relationship (id. p 6(v-w));
- according to a police interview on December 8, 1992, Cervantes admitted that he was smoking and drinking the night of July 19, 1992, that he had physically abused many women in the past, and that he had been romantically involved and had physically abused Lavergne in the past (id. p 6(x));
- a polygraph examination administered by an FBI agent conducted on December 9, 1992, suggested that Cervantes' responses to questions of whether he caused Lavergne's death were indicative of deception; in an additional interview with Cervantes, the FBI agent stated that Cervantes admitted to drinking and smoking pot the

day of Lavergne's murder and that he might have walked up Lavergne's residence on the evening of the murder.[4] (Id. p 6(y).)

Although Cervantes disputes many of these facts—and maybe properly so, in light of the fact that he was acquitted at trial—pivotally here, Cervantes presents no evidence disputing Jones' evidence that it was Barsanti, not Jones, who initiated and continued Cervantes' prosecution. Nor does Cervantes present any evidence that Jones' alleged fabrications had any role in the initiation and continuation of Cervantes' prosecution. Thus, there is simply no evidence upon which a reasonable jury could find that Jones played a "significant role" in causing Cervantes' prosecution or otherwise actively participated in that prosecution.[5] The case

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4. Parenthetically, on Cervantes' motion, the trial judge suppressed certain statements made to the FBI agent who took his polygraph upon finding that the statements were made involuntarily and in violation of Cervantes' Miranda rights. The trial judge additionally suppressed a statement by Cervantes to Jones as "fruit of the poisonous tree." On appeal, the appellate court affirmed the suppression of Cervantes' statement to the FBI agent, but reversed the suppression of Cervantes' statement to Jones.

5. Rather than present evidence on this issue, Cervantes states that he does not have "personal knowledge of conversations between Jones and Barsanti about [his] prosecution" and therefore he is "unable to agree or disagree with the contentions[.]" (Pl. 12(n), Ex. 7 p 9.) Cervantes requests that "[i]f these contentions are material to the motion for summary judgment, ... ruling on the motion [be] continued until [he has] had a full and fair opportunity to depose Jones and Barsanti." (Id.) As Jones states, Cervantes' request is improper. If Cervantes wanted to depose Jones and Barsanti before responding to Jones' summary judgment motion, he should have moved for additional discovery under Fed.R.Civ.P. 56(f), giving this Court "an adequate explanation ... of the reasons why the

Cervantes primarily relies upon, *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988), does not alter the result. In *Jones*, the plaintiff alleged that the defendant police officers arrested him without probable cause and prosecuted him despite the lack of any reasonable grounds to believe that he had committed the crimes. Evidence introduced at trial established that the police officers filed false reports and supplied false information to the state's attorney about Jones' culpability. Evidence further established that the state's attorney unwittingly relied upon those falsehoods in deciding to prosecute Jones. The police officers in Jones attempted to hide behind the state's attorney's decision to prosecute Jones, arguing that all of Jones' injuries resulted from that decision rather than their misconduct. The Seventh Circuit rejected the police officers' argument, stating that "a prosecutor's decision to charge, a grand jury's decision to indict, a prosecutor's decision not to drop charges but to proceed to

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extension is necessary," as required under that rule. *Farmer v. Brennan*, 81 F.3d 1444, 1449 (7th Cir. 1996). Cervantes did not do so. Cervantes states that he has not deposed Jones and Barsanti "to foster the climate for a reasonable settlement." (Pl. Resp. at 3.) However, settlement negotiations do not excuse a party from diligence in conducting necessary discovery. *See Sofo v. Pan-Am. Life Ins. Co.*, 13 F.3d 239, 242 (7th Cir. 1994). Furthermore, it was Cervantes' responsibility, not this Court's, to determine whether deposition testimony of Jones and Barsanti was "material" and, if so, to either timely obtain the discovery or timely request an extension under Rule 56(f). Because Cervantes has not done either, this Court must rule on this motion on the record before it. *See, e.g., Anderson v. Rizza Chevrolet, Inc.*, 9 F.Supp.2d 908, 915 (N.D. Ill. 1998); *Milton v. Chicago Park Dist.*, No. 96 C 6088, 1997 WL 417913, at *1 (N.D.Ill. July 23, 1997).

trial—none of these decisions will shield a police officer who deliberately supplied misleading information that influenced the decision." *Jones,* 856 F.2d at 994. The important aspect of the Jones decision for purposes of this case is that the alleged fabricated evidence must "influence the decision" to indict. Thus, if Barsanti proceeded with the prosecution independent of any misinformation allegedly supplied or concealed by Jones, then Cervantes cannot establish that the alleged deceit injured him. *See Buckley v. Fitzsimmons,* 20 F.3d 789, 796-97 (7th Cir. 1994) (noting that, in Jones, the plaintiff "alleged that the police had fabricated evidence, deceiving the prosecutor into filing criminal charges that the prosecutor never would have initiated had he known the truth ") (emphasis added). In considering Jones' motion to dismiss, this Court concluded that Cervantes had sufficiently alleged the type of claim recognized as actionable under Jones. This was because "[Cervantes'] claim, essentially, [was] that as a result of [Jones'] fabricated evidence, prosecutors filed criminal charges against [Cervantes] that they would not have otherwise initiated." *Cervantes,* 1997 WL 433685, at *4.

The record now clearly demonstrates, however, that this case is not analogous to *Jones.* As explained, supra, there is no evidence from which a jury could reasonably determine that as a result of Jones' allegedly fabricated evidence, Barsanti filed criminal charges against Cervantes that he would not have otherwise initiated. Therefore, because Cervantes cannot, as a matter of law, demonstrate this element of the malicious prosecution case, summary judgment must be granted for Jones.[6] II. Absolute Immunity

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6. Jones additionally argued that Cervantes could not make out a malicious prosecution claim because there was sufficient probable cause to prosecute Cervantes without the alleged fabricated evidence. The existence of probable cause, under both Illinois and federal law, is an absolute defense to an action for

As he did in his motion to dismiss, Jones additionally argues that he has absolute immunity for any false statements he made before the grand jury. As this Court explained in its earlier opinion, police officers generally possess absolute immunity from s 1983 liability for claims based on grand jury testimony. *See Cervantes,* 1997 WL 433685, at *2 (quoting *Curtis v. Bembenek,* 48 F.3d 281, 284 (7th Cir. 1995)). The Court noted, however, that there is no absolute immunity for a police officer who acts as a complaining witness, i.e., a party "who actively instigated or encouraged the prosecution of the plaintiff." Id. (quoting *Curtis,* 48 F.3d at 284 n. 5).

In ruling on Jones' motion to dismiss, this Court noted that: courts draw a distinction between those witnesses who played a role in initiating a prosecution and those whose role was limited to providing testimony. An officer in the former role is akin to a complaining witness and is not absolutely immune for his grand jury testimony if the testimony is relevant to the manner in which he initiated or perpetuated the prosecution of the plaintiff. *Cervantes,* 1997 WL 433685, at *3. Accepting as true statements in Cervantes' Complaint indicating that Jones initiated a baseless

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malicious prosecution. *See Schertz v. Waupaca County,* 875 F.2d 578, 582 (7th Cir. 1989); *Myatt v. City of Chicago,* 816 F.Supp. 1259, 1267 (1992); *Burghardt v. Remiyac,* 207 Ill.App.3d 402, 406, 152 Ill.Dec. 367, 565 N.E.2d 1049, 1052 (2d Dist. 1991). Here, although Jones has identified a considerable list of factors which Jones alleges demonstrate that Barsanti had probable cause to indict Cervantes, see, supra, at pp. 889-90, it is unnecessary here, in light of the rest of this opinion, to determine as a matter of law whether there was probable cause independent of Jones' alleged fabrications for Barsanti to seek Cervantes' indictment.

prosecution against Cervantes, this Court declined to dismiss Cervantes' Complaint on this ground.

Nevertheless, on the basis of the facts presented to the Court in this summary judgment motion, the Court now finds that Jones enjoys immunity for his grand jury statements. As the Seventh Circuit has remarked, "the complaining witness theory is closely associated with the common law cause of action for malicious prosecution." *Curtis*, 48 F.3d at 285. In both situations, the court seeks to determine whether the witness played a role in initiating or encouraging the prosecution.

Here, as the Court explained in the context of Cervantes' malicious prosecution claim, there is no evidence disputing Jones' contention that it was Barsanti, not Jones, who initiated Cervantes' prosecution. Barsanti independently reviewed the investigative reports and concluded, on his own, that there were sufficient grounds to take the matter before the grand jury and, upon indictment, to continue the prosecution of Cervantes. The evidence further discloses that Barsanti selected Jones to testify—indeed, subpoenaed Jones to testify—because of Jones' rank and familiarity with the investigation. (Def. 12(m), Ex. 1 p 9.) Under the factual circumstances here, Jones cannot be considered a "complaining witness," and, therefore, Jones is entitled to absolute immunity for any false statements he made before the grand jury.

CONCLUSION

For the foregoing reasons, Jones' motion for summary judgment is granted. Jones' motion to strike Cervantes' affidavit is denied.

ENTER:

/s/George M. Marovich
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JAMES J. CERVANTES,

Plaintiff,

No. 97 CV 1520 *v.*

LARRY JONES,

Defendant.

MEMORANDUM OPINION AND ORDER

Plaintiff James J. Cervantes (''Cervantes'') filed this action against Defendant South Elgin Deputy Chief of Police Larry Jones (''Jones'') pursuant to 42 U.S.C. §1983 (''Section 1983'') and Illinois law alleging claims of malicious prosecution. Cervantes alleges that Jones fabricated evidence that made it falsely appear that Cervantes had murdered a woman named Sally Laverne. Cervantes further alleges that Jones falsely testified before a grand jury to the truthfulness of the fabricated evidence and that, as a result, Cervantes was indicted for murder. Now before the Court is Jones's motion to dismiss Cervantes's Complaint. For the reasons set forth below, this Court denies Defendant's motion.

BACKGROUND

The following factual allegations are accepted as true for purposes of Defendant's motion to dismiss. *Bowman v. Franklin*, 980 F.2d 1104, 1107 (7th Cir. 1992), cert. denied, 508 U.S. 940, 113 S.Ct. 2417, 124 L.Ed.2d 639 (1993). On July 20, 1992, a woman named Sally Laverne (''Laverne'') was murdered in her home in South Elgin, Illinois. Cervantes alleges that although he was not involved in Laverne's death, beginning in July 1992, Jones, acting under color of law, sought to obtain evidence to link Cervantes with Laverne's death. In March 1993, after failing to obtain

any evidence to link Cervantes with the murder, Jones, acting *willfully, wantonly, and maliciously, fabricated evidence* that caused Cervantes to be charged with Laverne's death. Specifically, Cervantes contends that Jones falsely claimed that Cervantes had made an inculpatory oral admission regarding the murder. According to Cervantes, without Jones's made-up story, there was no probable cause for the initiation of any criminal proceeding against Cervantes.

On March 16, 1993, Jones testified before a grand jury to the truthfulness of the evidence that he allegedly had fabricated against Cervantes. On the basis of Jones's testimony, Cervantes was indicted for Laverne's murder. Cervantes was incarcerated on March 17, 1993 and remained in custody until March 7, 1996 when he was found not guilty and released.

On April 17, 1997, Cervantes filed a Complaint alleging that Defendant's actions violated the Fourth Amendment of the Constitution and also alleging a pendant state law malicious prosecution claim. Cervantes contends that as a result of Jones's actions, Cervantes lost wages, suffered severe emotional distress and, while incarcerated, was seriously injured by other inmates; Cervantes seeks compensatory and punitive damages.

Defendant now moves to dismiss Cervantes's Complaint in its entirety. Jones maintains that he enjoys absolute immunity for presenting false testimony to the grand jury and thus, that Cervantes cannot assert a claim based on such testimony. In addition, Jones contends that Cervantes has failed to allege a claim upon which relief can be granted based on Jones's alleged fabrication of evidence.

DISCUSSION

When considering a motion to dismiss, the court tests the sufficiency of the complaint, not the merits of the suit. *Triad Assocs. v. Chicago Hous. Auth.*, 892 F.2d 583, 586 (7th Cir. 1989), *cert. denied*, 498 U.S. 845, 111 S.Ct. 129,

112 L.Ed.2d 97 (1990). The court accepts all well-pleaded factual allegations as true and draws all reasonable inferences in favor of the plaintiff. *Antonelli v. Sheahan*, 81 F.3d 1422, 1427 (7th Cir. 1995); *Dimmig v. Wahl*, 983 F.2d 86, 87 (7th Cir. 1993). A motion to dismiss will be granted only if it is clear that the plaintiff can prove no set of facts that would entitle him to relief. *Conley v. Gibson*, 335 U.S. 41, 45-46 (1957).

To state a claim for malicious prosecution under Section 1983, a plaintiff must demonstrate that: (1) he has satisfied the requirements of a state law cause of action for malicious prosecution; (2) the malicious prosecution was committed by state actors; and (3) he was deprived of liberty. *Reed v. City of Chicago*, 77 F.3d 1049, 1051 (7th Cir. 1996). To state a claim for malicious prosecution under Illinois law, a plaintiff must allege that: (1) he was subjected to judicial proceedings; (2) for which there was no probable cause; (3) the defendant instituted or continued the proceedings maliciously; (4) the proceedings terminated in plaintiff's favor; and (5) there was an injury. *Curtis v. Bembenek*, 48 F.3d 281, 286 (7th Cir. 1995) (citations omitted).

A. Grand Jury Testimony With respect to Cervantes's claim that Jones knowingly presented false testimony to a grand jury, Jones argues that he is absolutely immune from suit. It is well established in this circuit that police officers are entitled to absolute immunity from suit under Section 1983 for giving false grand jury testimony to the detriment of potential plaintiffs. *Curtis*, 48 F.3d at 284; *Kincaid v. Eberle*, 712 F.2d 1023, 1023-24 (7th Cir.), cert. denied, 464 U.S. 1018, 104 S.Ct. 551, 78 L.Ed.2d 725 (1983). The Seventh Circuit has explained: "Whether testifying at trial or in a pretrial proceeding, a witness who knows he may be subjected to costly and time-consuming civil litigation for offering testimony that he is unable to substantiate may consciously or otherwise shade his testimony in such a way as to limit potential liability. Because of such tendencies to shade

testimony, witness immunity is accorded full disclosure as a means of ascertaining the truth." *Curtis*, 48 F.3d at 285 (quoting *Holt v. Castenada*, 832 F.2d 123, 125 (9th Cir. 1987)) (citations omitted). Cervantes argues, however, that Jones is not entitled to such immunity in this case.

Specifically, Cervantes contends that while a mere lay witness cannot be sued for his or her false testimony, this immunity does not extend to police officers who testify as a "complaining witness." (Pl.'s Resp. at 4). In support of his position, Cervantes refers to *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986), where the Supreme Court denied absolute immunity to a police officer for statements made in an affidavit for the purposes of obtaining an arrest warrant; the Supreme Court held that because the police officer's actions were analogous to those of a complaining witness at common law, absolute immunity did not apply. Id. at 340-41. In addition, Cervantes asserts that the Seventh Circuit implicitly recognized a complaining witness exception to the doctrine of absolute immunity in *Curtis v. Bembenek*, 48 F.3d 281, 286 (7th Cir. 1995), where it explained that a complaining witness is a party "who actively instigated or encouraged the prosecution of the plaintiff." (Pl.'s Resp., at 4). Cervantes contends that Jones is such a complaining witness and that, at most, Jones is entitled only to qualified immunity.

Jones, on the other hand, maintains that neither the Supreme Court nor the Seventh Circuit have definitively recognized the complaining witness exception to the absolute immunity doctrine. According to Jones, the Seventh Circuit in *Curtis* did not explicitly endorse a complaining witness exception to the rule of absolute immunity but simply observed that the "complaining witness theory is closely associated with the common law cause of action for malicious prosecution." 48 F.3d at 285. In *Curtis*, however, the court found that the plaintiff did not set forth a cause of action for malicious prosecution because he did not allege

that the underlying criminal proceeding concluded in his favor; as a result, the *Curtis* court held that the plaintiff's "reliance on the complaining witness theory [wa]s therefore inapplicable." Id. at 286.

In the present case, however, this Court finds that Cervantes has sufficiently alleged a claim for malicious prosecution. Moreover, the Court agrees with Cervantes that courts have denied absolute immunity to complaining witness defendants and have permitted malicious prosecution claims against them. *See, e.g., Tribblet v. Sanchez,* 1997 WL 106303, at *4 (N.D.Ill. Feb. 12, 1997); *Green v. Saenz,* 812 F.Supp. 798, 800-01 (N.D.Ill. 1992); *Anthony v. Baker,* 955 F.2d 1395, 1401 (10th Cir. 1992); *White v. Frank,* 855 F.2d 956, 958-59 (2d Cir. 1988). These courts draw a distinction between those witnesses who "played a role in initiating a prosecution" and those "whose role was limited to providing testimony." *White,* 855 F.2d at 958-59; *Green,* 812 F.Supp. at 800. An officer in the former role is akin to a complaining witness and is not absolutely immune for his grand jury testimony if "the testimony is relevant to the manner in which he initiated or perpetuated the prosecution of the plaintiff." *Anthony,* 955 F.2d at 1401.

For the purposes of a motion to dismiss, the Court must accept as true Cervantes's allegations that Jones presented false testimony before the grand jury and that this evidence was the only basis and the sole cause of Plaintiff's indictment for capital murder and three years of incarceration. Thus, this Court concludes that if, in fact, Jones acted as a complaining witness and initiated a baseless prosecution against Cervantes, he is not entitled to absolute immunity for his testimony before the grand jury. Accordingly, Defendant's motion to dismiss Plaintiff's claims on the grounds that Jones's testimony is protected by absolute immunity is denied.

B. Fabrication of Evidence Cervantes also bases his Section 1983 cause of action on Jones's alleged fabrication of evidence--namely, Jones's claim that Cervantes made an inculpatory oral admission regarding the murder of Laverne. Cervantes argues, relying on *Jones v. City of Chicago,* 856 F.2d 985 (7th Cir. 1988), that Defendant's conduct of deliberately supplying false information that resulted in Plaintiff's arrest, incarceration and prosecution is actionable under Section 1983. Defendant, not surprisingly, disagrees.

In *Jones,* the plaintiff alleged that the defendant police officers systematically concealed from the prosecutors and misrepresented to them, facts highly material to--or likely to influence--the decision whether to prosecute the plaintiff. Id. at 993. The Seventh Circuit recognized the officers' alleged wrongdoing as actionable under Section 1983, stating that "a prosecutor's decision to charge, a grand jury's decision to indict, a prosecutor's decision not to drop charges but to proceed to trial--none of these decisions will shield a police officer who deliberately supplied misleading information that influenced the decision." Id. at 994. The Seventh Circuit further discussed its holding in *Jones* in *Buckley v. Fitzsimmons,* 20 F.3d 789, 796-97 (7th Cir. 1994), stating: [E]vents not themselves supporting recovery under §1983 do not become actionable because they lead to injurious acts for which the defendants possess absolute immunity. *Jones [v. City of Chicago]* discusses both parts of the proposition. Jones alleged that the police had fabricated evidence, deceiving the prosecutor into filing criminal charges that the prosecutor never would have initiated had he known the truth. A prosecutor would have received absolute immunity, [] but the police who bilked the prosecutor were liable for the injury their deceit caused.

Here, construing Plaintiff's Complaint liberally in the light most favorable to him,[1] this Court concludes that Plaintiff has sufficiently alleged the type of claim recognized as actionable under Jones. Cervantes alleges that after Defendant failed to obtain evidence to link Plaintiff with Laverne's death he fabricated evidence that caused Plaintiff to be charged with her murder, and that, without Defendant's made-up story, there was no probable cause for the initiation of any criminal proceedings against Plaintiff. Therefore, Plaintiff's claim, essentially, is that as a result of Defendant's fabricated evidence, prosecutors filed criminal charges against Plaintiff that they would not have otherwise initiated. Such a claim, at this point at least, is cognizable under Section 1983.

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss Plaintiff's Complaint is denied in its entirety.

ENTER:

/s/ George M. Marovich
United States District Judge

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1. allegations of fabrication of evidence and perjury before the grand jury involve fraudulent conduct and, therefore, must satisfy the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). (Def.'s Reply, at 2). However, because Defendant waited until his reply brief to raise this argument, this Court declines to consider it. *See Wilson v. O'Leary*, 895 F.2d 378, 384 (7th Cir. 1990) (court may refuse to consider arguments withheld until the reply brief); *Doe v. Board of Educ. of Hononegah Community High Sch.*, 833 F.Supp. 1366, 1380 n. 4 (N.D.Ill. 1993).

IN THE CIRCUIT COURT
FOR THE 16TH JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff,	)	
-vs-	)	No. 93 CF 352
JAMES J. CERVANTES,	)	
Defendant.	)	

REPORT OF PROCEEDINGS had at the meeting of the Kane County Grand Jury, at the Kane County Courthouse, Geneva, Illinois, on the 16th day of March, A.D. 1993, at 1:00 P.M.

PRESENT:

Mr. David E. Akemann,
State's Attorney of Kane County, by
Mr. John A. Barsanti, Assistant State's Attorney
appeared for the People of the State of Illinois.

[2]

MR. BARSANTI: This is People versus James J. Cervantes, charged with the offense of first-degree murder. The Grand Jury has the right to subpoena and question any person against whom the State's Attorney is seeking a Bill of Indictment, or any other person, and to obtain and examine any documents or transcripts relevant to the matter being prosecuted by the State's Attorney.

LARRY JONES called as a witness herein, having been first duly sworn, was examined and testified as follows:

EXAMINATI0N

By Mr. Barsanti

Q. Would you state your name and spell your last name, please.

A. My name is Larry Jones, J-o-n-e-s.

[3]

Q. You're a South Elgin police officer; is that right?

A. That's correct.

Q. And were you involved in the investigation of the death of one Sally Lavergne, L-a-v-e-r-g-n-e?

A. Yes, I was.

Q. And Sally Lavergne was found deceased on what date?

A. She was found deceased on July 20, 1992.

Q. And was an autopsy performed?

A. Yes, it was.

Q. What was the cause of her death?

A. Her cause of death was caused by stab wounds to the chest and abdomen. And then there was also severe head trauma caused by blunt trauma to the head.

Q. Did you observe photographs of the body when it was at the morgue?

A. Yes, sir, I did.

Q. Were there multiple severe wounds in her head?

A. Yes, sir. I was also present at the [4] morgue during the autopsy.

Q. Is there some thought of what caused these wounds?

A. Yeah, they were caused by what appeared to be a large glass ashtray. It was kind of an amber color, very large. We recovered a small piece of it at the scene, not the

remainder of the ashtray.

Q. Witnesses would indicate there was such an ashtray in the apartment?

A. That's correct.

Q. Theoretically, at this point you're guessing at this, but she was struck many, many times in the head with that?

A. Oh, it would be many times. It caused four compressed skull fractures along with a massive ripping of the flesh on the side of her head.

Q. And then she was also stabbed?

A. That's correct.

Q. Where?

A. She was stabbed two times in the throat, one on each side. And there was five other stab wounds. They were deep thrusts to the [4] body with a butcher knife remaining in one of them.

Q. So this body was then found. Neighbors had indicated that no one had seen her, her friends, and then that she had been missing and then her apartment was examined; is that correct?

A. No, that's not correct.

Q. How did it happen?

A. A neighbor across the hall — she lived in a six-flat building — had reported that her clock radio had been playing very loud for a long amount of time. He knew she lived alone. He'd stepped across the hallway. He saw that her door was ajar, and he didn't want to go in there. He went back and called the police.

Q. So then when the police arrived, they knocked, without getting any answer, and observed the same things, the clock radio, the door being ajar, and you entered?

A. Yes.

Q. The body was laying on the couch in her living room?

A. That's correct.

[6]

Q. Was it in a state of undress at that time?

A. It was.

Q. Can you describe that?

A. Yes. She had — I could have best described it as a sleeper shirt. It would be like a long-length T-shirt. And that was the only thing she had on. It was pressed up bunched in her armpits and I believe it was the right breast that was visible.

Q. Did she have any other undergarments on?

A. No, she did not.

Q. So other than this T-shirt, she was nude?

A. That's correct.

Q. And then there was a knife sticking out of her torso area when she was found?

A. Yes.

Q. Lying on her back?

A. Yes, sir.

Q. Was there a great deal of blood?

A. Oh, yes, sir. Not much blood from the [7] stab wounds, but a great amount of blood from the head wounds. It was enough that it had soaked through the couch and was puddled on the floor underneath the couch.

Q. Was there blood evidence in any of the other rooms?

A. Yes, there was.

Q. Specifically the bathroom?

A. There was blood evidence.

Q. What was in there?

A. There was blood spots that lead into the bathroom. There was blood in the — it was like — it appeared to be water-diluted blood in the bath tub. And then there was also some blood spots on the toilet seat.

[7]

Q. Did it appear to you at the scene that someone cleaned themselves up?

A. Yes, sir, it did.

Q. Now, did there appear to be fingerprints or palm prints or handprints on the toilet?

A. There appeared to be at least a smudge of blood like a fingerprint on the bottom of the toilet seat.

Q. Now then, your investigation began. Did you come to James Cervantes, the defendant here, as a possible suspect?

A. Yes, I did.

Q. How did you come upon him?

A. Well, his name was mentioned to us by many people who were familiar with the victim. He was described sometimes as a boyfriend of hers, as a friend. And a couple of neighbors felt that he was a person that just hung around and took advantage of her.

Q. Now, was she normal?

A. No, she wasn't normal. She was a bit eccentric and not necessarily retarded, but I would consider her a bit off center in her behavior.

Q. So that was something that people knew about her, as maybe someone that somebody could take advantage of?

A. That's correct.

Q. Now, did you then start your investigation as to Mr. Cervantes? Could you describe for the Grand Jury what was their relationship like?

[8]

A. Their relationship, when I talked to him the first time, was very close friends. it was a strange relationship. He is married. He would use her apartment to meet a woman he was having an affair with. He would also stay at — I'm sorry — use her apartment, meaning Sally Lavergne's apartment. He would also stay at Sally Lavergne's apartment on his own without the meeting of the girl. He apparently would have sex with Sally Lavergne. It was a very strange thing that — his comings and goings.

Q. So, in other words, early on you spoke to Mr. Cervantes?

A. Yes, I did.

Q. And he denied any knowledge whatsoever?

A. That's correct.

Q. Did he give himself an alibi?

A. Yes, he did. It appeared that the death had taken place sometime during the night, late evening of the 19th to the time of about 6:36 a.m. on the 20th. But it wasn't very close to that because the blood puddled wasn't that fresh.

[10] He said that he had on the 19th, which would have been a Sunday had left his apartment that he shares with his girlfriend and had done some shopping, had gone to his mother's house in South Elgin. And then he had come back to the apartment that he shares with his girlfriend at about 5:30, and he had not left the apartment after that.

Q. Which would — and if that was actually true, then he could not have been the person that killed her?

A. That's correct.

Q. Because she was seen at — what was the last point she was seen?

A. Approximately 9:45 p.m. she left a restaurant in South Elgin.

Q. So 9:45 p.m. was the last time she was seen, and her body was discovered the next morning?

A. That's correct.

Q. Now, you indicated that — it's a little confusing. But he was married early in this relationship and used her apartment as a point where he could meet his girlfriend. But [11] later on he left his wife and moved in girlfriend?

A. That's correct.

Q. And that was the situation at the time of her death, Sally Lavergne's death?

A. That's correct. He was estranged from his wife and living with the girlfriend that he used to meet at the victim's house.

Q. Now, did you inquire with the girlfriend as to the truthfulness of this alibi he gave himself?.-

A. Yes, I did.

Q. What's the girlfriend's name?

A. Her name is Penny Newman, N-e-w-m-a-n.

Q. What did she say?

A. She concurred with what he had said. She was she said that he had gone a few times. She had a friend at her house on the 19th of July and t ha t James had left several times. But when he. did, in fact, return at 5:30 he had not left after that.

Q. Did you ask his mother?

A. Yes, I did.

[12] Q. What did she say?

A. She said that she had not seen him. I actually spoke to his mother before I talked to James. She told me that she had not seen him for quite a long time and that he didn't come to her house on weekends because she works strange hours.

Q. So she indicated that she did not see him on the 19th?

A. That's correct.

Q. Then your investigation continued; is that correct?

A. That's correct.

Q. Now, at some point in time did you interview people at the restaurant where she would normally eat and where she ate that night prior to her death?

A. Yes, I did.

Q. And did anybody there give you any information about the nature of the relationship between Cervantes and the deceased?

A. Many of the waitresses and operators of the restaurant remembered the victim. She ate [13] almost all of her meals there.

They remembered that there was a younger man than her — she was 48 at the time of her death and he was a Hispanic, kind of small build with glasses — that would come in occasionally when she was there and visit with her and that the victim spoke about this man quite a bit.

Q. Did you do any identification procedure to determine if who they were talking about was Cervantes?

A. No, I did not.

Q. But you assume that to be the case?

A. Yes.

Q. Because that fit his description?

A. That's correct.

Q. What did she say about him?
A. I'm sorry?

Q. What did the witnesses say Sally Lavergne said about Cervantes?
A. She sometimes referred to him as a friend, sometimes as a boyfriend. She remarked how she would get up early to give him rides to the train station because he has no driver's license. Things like that.

[14]

She would just — she was sometimes mysterious and sometimes rather gushing about her relationship with him.

Q. On the day of her death, the 19th of July, did she indicate that they'd had some argument?
A. No, that would have been the 17th of July.

Q. A couple days before?
A. A couple of days before. She was in that restaurant eating at the counter. The fellow that the witnesses described that fits the description of Cervantes came in. He and the victim moved over to — they left the counter and moved into a booth. They had a very quiet conversation, not very long. He left the restaurant. The victim came back and said — got to the counter and told the waitress that was waiting on her that he was mad at her.

Q. Did she say why?
A. She told them that she had told him he could not use her apartment anymore.

Q. This would have been on July 17?

[15]
A. That's correct.

Q. And, again, your investigation continues. At some point in time did you arrange for Cervantes to take a lie

detector test?

A. Yes, I did.

Q. And did he, in fact, come to the South Elgin police department and take that test?

A. Yes, he did.

Q. And did you receive the results of the test?

A. Yes, I did.

MR. BARSANTI: Now, keeping in mind for the purposes of the Grand Jury, I'd like to advise you that polygraphs are not admissible in trials in Illinois for any reason whatsoever.

BY MR. BARSANTI:

Q. But for purposes of this investigation, what was the results of the polygraph examination?

A. There were two questions that directly* related to his involvement in the death of Sally Lavergne that the FBI polygraph examiner felt he was deceptive about.

[16]

Q. Do you know what those questions were?

A. I don't know the particular wording, but one of them was did he do it and — did he kill her. And I don't remember the wording of the other, but it was along the same line. it was just a small variation from that.

Q. Indicating that he was being deceptive about his answer in those places?

A. That's correct.

Q. His answers were that he had nothing to do with it?

A. That's correct.

Q. After that particular polygraph examination when it was all finished, did you then offer to drive him home?

A. Yes, I did.

Q. And did you?
A. Yes.

Q. What time of the day or night was it?
A. Actually, I didn't offer. He requested that I take him home.

Q. What time of the day or night was that?
A. It was about 5:00 in the morning.

Q. And he had been with the police for [17] some time at that point?
A. We had come into the police station, I would only guess it to be, about 11:30 or 12:00 midnight. But I had been — two other investigators and I had been talking to him at his home prior to that.

Q. Jumping back prior to the polygraph now, in your other conversations with him that day, had he changed his original story?
A. Yes, he had.

Q. What did he change it to?
A. He initially when I was there talking to him by myself earlier in the evening, he told me that he would not go to the police station with me; that he didn't want to talk to the police. Well, actually, not that he didn't want to talk to the police, his attorney had told him not to talk to the police. He didn't tell me he didn't want to. But he wasn't sure what he should do.

He invited me to sit and talk with him for a while. He was sharing with me that the relationship with the girlfriend he lived with was falling apart; that he had physically abused [18] her. She had moved out from him; and that also has a severe drinking problem. And during the course of the conversation, he told me that he can't control his temper when he's drinking, and it's caused him problems with other

girlfriends that he's he and that. So I left.

I came back later with two other investigators and we talked again. And at that time he said that he would not mind talking to the police about it; he just did not want to leave his apartment to do it.

So we sat down. And during that time we were kind of talking to him about some of the things that didn't seem to follow. There had been some changes in statements from the beginning.

When I talked to him on the 20th, he told me he had no keys to the victim's apartment. When I talked to him on the 25th of July, he gave me a key to the victim's apartment saying he had just thought about it, that he still had that. We talked about that.

I talked to him about his mother saying, [19] he had not been there that day. He said that he did not remember; that he may have, in fact, not told me the truth when he told me that.

He told me at that time that he had abused the victim in the past. We had witnesses that said she had bruises and at one time a black-eye from abuse from him.

He said that he had abused her before, but he didn't think that it led to those bruises that we had seen. It was more along that same line when we talked.

We went back and we had talked to many girlfriends of his that had been abused. One of them was pregnant with his child, and she had made a police report before that he had abused her.

Q. When you say abused, you mean physical abuse?

A. Physically abused her, yes, like hitting and kicking.

Q. So what you're able to determine on this interview and subsequent interviews was that he, in fact, did have a key, which he told you he didn't before?

[20]

A. That's correct.

Q. And he, in fact, admitted that he might have lied to you originally about where he had been during the time?

A. That's correct.

Q. And, also, you were able to determine that he was, in fact, physically violent towards his girlfriends?

A. That's correct.

Q. And, in fact, had been physically violent towards her?

A. That's true.

Q. Through his own admission?

A. Yes.

Q. Then he went to take the polygraph and you testified about that already. I want to get to when you're driving him home. Did you have a conversation with him then?

A. Yes, I did.

Q. Could you tell the members of the Grand Jury what you said and what he said?

A. Yes.

I was driving him home and — James [21] Cervantes grew up in South Elgin. I've probably known him about 20 years.

And I was driving along and he seemed rather deep in thought. He was looking out the window. And I said to him, "It seems to me like you would like to admit what you've done, get it out of the way, get the punishment that you deserve for doing it and get started with the rest of your

life.''

Q. Stop there for a moment. I want to point out for the record that, of course, he was not in custody at this time.'

A. No. He had asked me to drive him home.

Q. In fact, you were driving him home?

A. Yes, sir, I was.

Q. And after you said that, did he respond?

A. Yes, he did.

Q. What did he say?

A. He said, ''Yes, I would like to do that.'' And I looked over at him and he said, ''But I've got too much too lose.'' And so I drove — we probably rode together another two minutes and then he looked [22] at me and said, ''If I admit I killed Sally, what would my defense be?'' And I just remarked to him that it would give him a chance to tell people about his drinking problems and about his prior abuse problems and that it would also give him a chance to tell people a part of it that he would have seen from being there instead of what we saw from being there. When I dropped him at his apartment, he told me he did not remember everything that had happened. But he was going to try and remember everything and he would get back in touch with me.

Q. Now, did he ever make a comment to you concerning the prints on the toilet?

A. No, he made that comment to the FBI polygraph examiner.

Q. During the exam?

A. It was a post-exam interview.

Q. Relate that to the members of the Grand Jury.

A. During the post-exam interview, the FBI polygraph examiner — they kind of go through an interview of the subject when they're done with [23] them.

During that interview, James Cervantes had told the polygraph examiner, Special Agent Hanna, that he had, in fact, been at a park near Sally Lavergne's house the night she was killed and that he had been drinking heavily and smoking pot; that he thinks he remembers approaching her building. Again, it was a six-flat. But he does not remember going in there.

And when shown a picture of the toilet seat in an upright position with the bloody smear-type fingerprint underneath, he told Special Agent Hanna that that might be his fingerprint.

Q. Now, there was one other aspect I wanted to talk about is the key. Now, there was a key found in the apartment; is that correct?

A. Yes. Her apartment had a dead bolt on the top and what I would consider a snap lock on the doorknob.

Q. So you need two keys?

A. That's correct.

Q. And inside the apartment, did you find [24] one of the keys?

A. I found a key to the snap lock. It was on — as you come in the apartment door, as you come in this way, once you're in the apartment, there's about a five-shelf bookshelf here. And the key to the snap lock was on the second shelf right by the door.

Q. And the key that he gave you was the key to the dead bolt?

A. That's correct.

Q. Did you find her keys there, also?

A. Yes, I did.

Q. A set of her own keys?

A. Yes.

Q. Now, for physical evidence, scientific evidence, was she raped?

A. No, she was not.

Q. So there was no rape kit evidence that you could use to determine that?

A. That's correct.

Q. Now, was a fingerprint analysis done of the apartment including the toilet seat?

A. Yes, it was.

Q. And were you able to make any latent [25] lifts; in other words, lifts which would be suitable for comparison with somebody?

A. The State Police crime scene technician attempted several lifts and also sent items to the State Police Crime Lab to be processed under a more perfect condition. We got no latents suitable for comparison at the scene.

Q. And since they sent that, nothing came up either; is that correct?

A. That's correct.

Q. That would have been back in July or August?

A. That's correct.

Q. Any other information or evidence that you've developed other than what we've talked about?

A. No. I'm not sure if — one of the things I mentioned during my conversation with James Cervantes was he also had — I'm sorry. One of the other things we had found out, there was a girl that was visiting Penny Newman the day that the — on the Sunday that [26] this might have occurred that we located who lives over in Palatine. We had talked to her. And, I'm sorry, without my report I can't remember her name. I'm sorry.

She had been present and was a very good friend of Penny Newman's. They were childhood friends. One of the

things she remembered was that Penny Newman had said when James came back that he had talked to his mother and she was going to help him with his divorce. And the friend felt that she was financially going to help with the divorce.

She also remembered that on that day Penny Newman had said to her that that night she and James were going to visit a friend of James, named Sally.

Now, later on when she was talking to Penny, Penny had remarked that another officer- and I were there talking to them about a murder and it was a friend of James' named Sally. And the friend remarked to her "Isn't that the same person you were going to go see that night?" And she said, "Yes, but we didn't go. James was too tired."

[27]

And also when I talked to James about money, he had told me that he many times borrowed money from Sally and there were some times he never paid her back.

Q. Put this in a little bit of perspective at this point in time. Let me run through some of these points and you can agree or not if this was the case.

James Cervantes and the deceased had a personal relationship and he did, in fact, have a key to her apartment? A. Yes, he did.

Q. In fact, both keys. Did he indicate that?

A. At one time he had both keys so he could come and go whenever he wished.

Q. And one of those keys was found in the apartment at the time of the murder?

A. That's correct.

Q. And then there's witnesses who would testify that Sally Lavergne complained of and showed evidence of being physically abused by James Cervantes in the past? A.

Yes.

[28]

Q. And that he had admitted that?
A. Yes.

Q. James Cervantes admitted that he, in fact, has physically abused women, including Sally Lavergne, in the past?

A. That's correct.

Q. And that he had an uncontrollable temper when he drinks?

A. That's correct.

Q. James Cervantes then gave an alibi concerning that he spent some time with his mother the day of the 19th when his mother indicated that that was not the case?

A. That's true.

Q. He did not go over there that day?
A. That's correct.

Q. And there was some information that James Cervantes and his girlfriend were going to visit Sally that night that had been commented on earlier in the day?

A. That's correct.

Q. And the last time that Sally was seen alive was about sometime before 10:00 p.m. on the night of the 19th?

[29]

A. That's correct.

Q. And she was found deceased around 6:00 a.m. the next morning?

A. Approximately 6:36, yes.

Q. And there was no forced entry into this apartment; is that correct?

A. That's correct.

Q. Has your investigation showed that Sally Lavergne had any other relationships with any other men?

A. We found nothing in recent times, no.

Q. Was anything stolen?

A. Not that we could find.

Q. And you did find one of the keys was still in the apartment? I think you said that.

A. Yes.

Q. There was blood and apparently a fingerprint which was not suitable for a comparison found on the toilet seat?

A. Yes.

Q. And had James Cervantes indicated that that might be his print?

A. That's correct.

Q. And James Cervantes indicated that he [30] had been in the park near her building that night?

A. That's correct.

Q. And that he had been drinking and smoking marijuana?

A. Correct.

Q. And he remembers approaching her building?

A. He said that he may have approached it.

Q. He may have approached the building?

A. Yes.

Q. And he said the fingerprints on the toilet seat might be his?

A. That's correct.

Q. This all occurred in Kane County?

A. Yes.

MR. BARSANTI: Do you have any other questions?

A JUROR: I have a number of questions.

No fingerprints available on the knife?

THE WITNESS: No. It actually appeared it could have been wiped clean while it was in her.

[31]

A JUROR: Anything under the victim's nails to —

THE WITNESS: Well, there were some fibers in her hands. There was nothing under her nails, but there were defense wounds on her hands that did not appear to be made by the knife. They had- more jagged edges that looked more like they were to push away from the blunt trauma that was happening to her.

A JUROR: How soon after her body was found was Cervantes questioned or talked to?

THE WITNESS: Okay. Her body was found at 6:36 a.m. on the 20th, and I talked to him approximately 11:30 p.m. on the 20th.

A JUROR: Was any effort made — and I don't know if you even could have done it legally at this time — to look him over to see if he had any scratches or bruises, or did you see any marks?

THE WITNESS: Well, I certainly had tried to do that as much as I legally could. He was in bed when I went — when I finally found where he lived, it was very late. He and his girlfriend were both in bed and I, in [32] fact, interviewed him in front of her. I saw no marks on him.

A JUROR: What about any bloody clothing of his; nothing was ever recovered from his trash or

THE WITNESS: No, no. I would say that other than the fact that his mother saying that he didn't — that she hadn't seen him — by the time I took him — when I talked to him

on the 20th, I would not say I totally focused on him.

I mean, it's a big apartment complex, and my initial talk with him was not something I immediately focused on him as the total suspect.

A JUROR: None of the neighbors heard screaming or yelling when this was — this murder was taking place?

THE WITNESS: No. I think I'd like to — maybe I could best describe it to you. It's not a subsidized apartment complex. But I would call it a middle to low middle class apartment complex where there's a great deal of noise in those six flats all the time.

[33]

And I think the people there build up a certain noise tolerance. Like the lady upstairs says, "I hear her alarm clock every morning, but I don't pay attention to whether it gets shut off or not."

MR. BARSANTI: Anybody else?

A JUROR: You said that, I believe, that the ashtray you believe was used as a blunt trauma instrument. Was that never recovered you said?

THE WITNESS: It's never been recovered. We found a piece about that size. It was like in her hair, matted in her hair.

A JUROR: And you couldn't account for how that disappeared or —

THE WITNESS: Well, we can only account for the fact that the offender would have had to take it with him.

A JUROR: When you recovered the key in the apartment, did you check that for fingerprints?

THE WITNESS: No, I did not. Actually, I was inventorying the apartment, and I was looking and there were many keys. By the time I tried to — I mean not in that particular — but through the place. And [34] I'm afraid that once I

found that it actually fit the door, I had already — I was the one who tried it on the door. I felt it had no evidentiary value.

A JUROR: Did James ever give any indication why his mother didn't back him up? Did he come up with some other story as to where he was or —

THE WITNESS: No. He only told me that he may not have told me the truth when he told me that. That was it.

A JUROR: What was the age difference between him and the victim?

THE WITNESS: I would guess his age at the time of the murder at 31, and she was 48 at the time. I think he may have turned 32 now, but I believe that he was 31 at the time; she was 48.

MR. BARSANTI: Anybody else? (No response.)

(Which were all the proceedings had in said matter on said date.)

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JAMES J. CERVANTES,

Plaintiff,

No. 97 CV 1520 *v.*

LARRY JONES,

Defendant.

SWORN STATEMENT OF JAMES CERVANTES

The undersigned, under penalties of perjury, cer- tifies that the following statements are true:

1. My name is James Cervantes. I am the plaintiff in Cervantes v. Jones, 97 CV 1520.

2. My first conversation with defendant Jones about the Sally Lavergne homicide was on July 19, 1992.

    a. Jones did not at any time during that conversation ask me if I had had a sexual relationship with Sally Lavergne.

    b. I told Jones that I had had a key to Sally's apartment and that I believed that I had returned the key.

    c. I also told Jones that I had not seen Sally for about two or three days before her death. I am aware that Jones claims that I told him that that I had not seen Sally for two or three weeks. Jones is in error in this claim.

    d. I also told Jones that I had been to my mother's house in the afternoon of July 19, 1992 and that she had not been at home. I never told Jones

that I had seen my mother in the afternoon of July 19, 1992. I am aware that Jones claims that I told him that I had seen my mother in the afternoon of July 19, 1992. Jones is in error in this claim.

3. I do not have personal knowledge of whether Marguerite Lombardo told Jones that "Sally Lavergne [had] told Ms. Lombardo that the man was 'mad' at Sally because she had not told him that he could use her apartment anymore." I do know that I was not made at Sally when I spoke with her two or three days before her death. If the truth of this contention (paragraph 17 of defendant's 12(m) statement) is material to the motion for summary judgment, ruling on the motion for summary judgment should be deferred until I have had an opportunity to depose Ms. Lombardo.

4. Arlene Miller (referred to in paragraph 18 of defendant's 12(m) statement) was a homeless person who was known to be addicted to drugs. I believe that Ms. Miller's lack of credibility was known to Jones.

5. My second conversation with defendant Jones about the Sally Lavergne homicide was on July 25, 1992. Jones asked me, for the first time, whether or not I had had a sexual relationship with Sally. I truthfully answered this question by telling Jones that Sally and I had been intimate in 1990 and 1991 and that we had ended our sexual relationship in about October of 1991 but had remained friends thereafter.

6. On December 8, 1992, I again spoke with defendant Jones about the Sally Lavergne homicide.

    a. I did not tell Jones during this conversation that I have "difficulties controlling my temper when I drink." I am aware that Jones contends that I made such a statement during that conversation.

Jones is in error in this claim.

b. I told Jones that I had been drinking beer and smoking marijuana in the afternoon of July 19, 1992. I am aware that Jones contends that I told him that I had been drinking beer and smoking marijuana in the evening of July 19, 1992. Jones is in error in this claim.

c. I did not tell Jones that I "may have lied to the police about visiting my mother on July 19, 1992." I consistently told Jones that I had gone to my mother's house and that she had not been home. I am aware that Jones contends that I stated I "may have lied" about this. Jones is in error in this claim.

d. I did not tell Jones that I "may have lied about not having a key to the victim's apartment." I told Jones that I had found the key after our first meeting and that I had been mistaken about having returned the key to Sally. I am aware that Jones contends that I stated I "may have lied" about this. Jones is in error in this claim.

7. I never told Agent Hanna that I "had walked up to the victim's residence but did not remember going inside." (12(m) Statement, par. 36.)

8. I never told Agent Hanna that the fingerprint from the toilet "may have been [mine]." (12(m) Statement, par. 36.)

9. I do not have personal knowledge of conversa- tions between Jones and Barsanti about the my prosecution and, without depositions of Jones and Barsanti, I am unable to agree or to disagree with the contentions of paragraphs 41, 42, 44, 46, and 55 of defendant's 12(m) statement. If these contentions are material to the motion for summary judgment, I request that ruling on

the motion to continued until I have had a full and fair opportunity to depose Jones and Barsanti.

Dated: May 2, 1998

/s/ James Cervantes